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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 921

MARVIN S. SAMUELS,
Petitioner,
vs.
THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of California

EVANDER C. SMITH,
683 McAllister Street,
San Francisco, California 94102,
Attorney for Petitioner.

ROBERT S. FIELD,
683 McAllister Street,
San Francisco, California 94102,
Of Counsel.

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Petitioner, Marvin S. Samuels, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered July 19, 1967.

OPINIONS BELOW

The opinion of the California Court of Appeal, *People v. Samuels,* 58 Cal. Rptr. 439, is attached

hereto as Appendix A. The opinion of the Supreme Court of the State of California is reported in 250 A.C.A. 571.

JURISDICTION

The judgment of the California Court of Appeal was entered April 28, 1967. The judgment denying hearing by the Supreme Court of the State of California was entered July 19, 1967. Upon counsel's motion timely made to the Supreme Court of the United States, Justice William O. Douglas granted until December 16, 1967, for filing of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since a right, privilege or immunity is specially set up and claimed under the Constitution of the United States, as more particularly set forth hereafter.

QUESTIONS PRESENTED

1. Whether the people's prosecuting attorney may willfully conceal or suppress applicable defense evidence unknown to defendant and counsel, in the possession of the prosecutor.

2. Whether the people's prosecuting attorney may willfully mislead the Court by stating falsely and knowingly in his closing argument to the jury:

> "The only evidence on the subject *there is no letter from them* (the Kinsey Institute at the

University of Indiana), there is no authorization. There is no witness from them. *There is not the slightest indication that if they were legitimate they had anything to do with this movie* other than Mr. Anger (prosecution witness) who is an unusual man who does, apparently, from time to time, send them things." (Reporter's Transcript, Volume V, pp. 1575-6, lines 23-26, 1-3; emphasis added.)

"*There is no evidence anywhere* in the case that the doctor had any contact at all with the Institute of Sex Research at the University of Indiana. *There is no evidence that they in any way* commissioned, authorized, paid for, *suggested these be made, other than the statement of Anger* (prosecution witness) that from time to time he had shipped them material." (Reporter's Transcript, Volume V, p. 1507, lines 15-21; emphasis added.)

"He had all of this gear ahead of time, and to say he did this in aid of a legitimate scientific and educational purpose, I think, flies in the face of the evidence. I am not going to decide. I never decide cases. It is up to you. I present it, and you are the ones who make the decision. I just think that to say that on this evidence is to (sic) far-fetched. Unintelligent man, perhaps, with low intelligence, might meet some fellow like Anger, be enthused upon a scientific adventure under those circumstances; in that context and at that time of night a stranger and all the rest of it, *with no contact whatsoever with any legitimate firm or educational organization such as Kinsey,* or anything else, no letter, *no nothing,* I think it flies in the face of the evidence. You will

have to decide it, because, as I conceive it, there is no principal defense to those two charges." (Reporter's Transcript, Volume V, p. 1509, lines 6-20; emphasis added.)

Additionally, throughout the prosecutor's cross-examination and closing argument in numerous references he brainwashes the Court and jury into a false belief *that there is no written material or sanction from the University of Indiana* other than the *oral testimony* of the prosecution's witness, Kenneth Anger. *All the while the prosecutor had in his possession the following letter:*

"Indiana University
Bloomington, Indiana

September 21, 1964 Jordan Hall

Institute for Sex
Research, Inc.
Founded by Alfred
C. Kinsey

Mr. Kenneth Anger
850½ North Coronado Street
Los Angeles 26, California

Dear Ken:

In keeping with your wishes we cleaned the projector, projected the film only once, and mailed it back to you the same day it was received. To be scientifically accurate perhaps I should say that I gave it to Bill to return to you that same day and to enclose a *note of gratitude. The film was, as you knew it would be, of definite interest to us and we look forward to the final product. Thank you very much.*

You also have our thanks for the archival material you donated. The *Sphinx Club murals* intrigued me since I recalled your story of how they were photographed. Mrs. Egan was much taken with the Crowley book, especially since publications from the Mandrake Press are rare.

Best regards,
/s/ Paul
Paul H. Gebhardt"

PHG:s
(Emphasis added.)

3. Whether the people's prosecuting attorney may violate with impunity the California Bar Act which, in referring to lawyers engaged in public prosecution, provides:

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. *The suppression of facts* or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." (Emphasis added.)

The California State Bar Act and Rules of Professional Conduct (September 1965) §5, p. 40.

The California Court of Appeal has accepted this unethical conduct by the prosecuting attorney by stating:

"The conduct in question obviously related to the conspiracy charges only and could not conceivably have contributed to defendant's conviction of aggravated assault."

People v. Samuels, 58 Cal. Rptr., p. 449 ¶18.

In light of the problem of improper joinder of offenses as indicated in Question No. 3, supra, can the California Court of Appeal answer affirmatively, the following test:

> ". . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."
>
> *Chapman v. California,* 17 L. Ed. 2d 705 (1967).

4. Whether a defendant receives a fair trial when the prosecutor includes counts of a State Statute which is clearly unconstitutional and which statute is in fact subsequently so declared to be unconstitutional, the appellate court issuing an order of reversal and dismissal of those invalid convictions, *People v. Samuels,* 58 Cal. Rptr. 439.

Should the defendant be given a fair trial on the one remaining count, without the now dismissed inflammatory and unconstitutional counts, as required by the Fourteenth Amendment to the United States Constitution? *Sheppard v. Maxwell,* 384 U.S. 333.

5. May a defendant be convicted of the crime of assault by means of force likely to cause great bodily harm when in fact no such assault ever occurred; where there never was a "victim"; where there was no complaint; and where there was no corpus delicti; all in contravention of the Fourteenth Amendment to the United States Constitution?

6. Whether, when a search is made pursuant to a search warrant, the seizure of material not described

therein is illegal as exceeding the scope of the search warrant in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

7. Whether, when a search is made incidental to an arrest, the seizure of *non*-contraband material *not* evidence of the alleged crime for which the arrest is made, may be sustained.

8. Whether defendant's rights under the Fifth Amendment to the United States Constitution were violated by the prosecuting attorney procuring his arrest based on an information charging aggravated assault from an inferior court *after* the County Grand Jury refused to indict the defendant on the identical evidence.

9. Whether in the absence of the corpus delicti of the crime of assault, the Court erred in permitting double hearsay statements about the defendant's reputation as a sadist to be introduced into evidence. *Example:* (1) Anger, prosecution witness, who purportedly told (2) Logan, prosecution witness, who stated this double hearsay in Court. (Reporter's Transcript, Volume I, p. 127, line 9 to p. 147; p. 153, line 25 to p. 154, lines 1-12.)

> ("Peculiar or characteristic behavior pattern" known as modus operandi, a characteristic method or plan pursued by a defendant in the performance of repeated criminal acts does "not open the door to indiscriminate proof of the defendant's sadistic character." *People v. Chambers*, 231 C.A. 2d 23.)

10. May sui juris parties enter into a valid sado-masochistic relationship where the acts are in private with no opportunity for the public to know of their existence by any means?

11. May the petitioner now with a silent record attack the impropriety of the trial facets as follows: A change of venue should have been sought due to the undue amount of sensational publicity which the local news media gave the case from the time of arrest and throughout the trial; a local practicing physician who was, according to the press, receiving guests in his "torture chamber" from as far away as New York for administration of beatings while bound and gagged.

STATEMENT OF THE CASE

This Court is respectfully referred to the Court of Appeal's decision of April 28, 1967, in the Appendix, infra, for a resume of the facts giving rise to the case.

After the Court of Appeal's decision was rendered, the defendant was ordered to appear in Superior Court for the modification proceeding as directed. At this hearing the original prosecuting attorney moved that the Court set a new trial date for the two matters ordered vacated and set aside and then became so emotional and distraught that the Judge had to postpone the hearing to another date and assigned the matter to another Judge.

On September 11, 1967, the Honorable Harold Holden signed a Modified Order of Probation (1) re-

ducing the original 10-year period of probation to 5 years from October 7, 1965, the date of the original imposition of sentence; and (2) lowering the fine to $2,000.00 plus penalty assessment in the amount of $200.00, said fine and assessment to be paid after termination of upper Court proceedings. This was pursuant to a stipulation of the district attorney's office with a different and objective attorney than the one who had previously handled the case.

REASONS FOR GRANTING THE WRIT

1. A calloused and reprehensible act by the prosecuting attorney occurred in the trial. Questions presented in Nos. 1, 2 and 3, all present distinct areas of misconduct which violated the defendant's right to a fair trial as demanded by the Fourteenth Amendment to the United States Constitution. Obviously the trial record is silent by way of objection by defense trial counsel due to his ignorance of the chicanery being practiced by the prosecutor. Concealment of evidence by a private attorney; misleading the Court and jury with outright falsehoods by a private attorney; and disregard of proscribed ethics by a private attorney; would result in his being properly dealt with in the most severe manner available to the Courts and the Bar Association. This Court is asked to follow through on its unequivocal stand as recently enunciated in *Giles et al. v. State of Maryland,* and *Miller v. Pate,* infra, and crystalize the principle that the "People's"

advocate has a responsibility to work within the framework of honesty and responsibility.

> "A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greatest resources, be the 'winner'."
>
> "A number of circuits have recently held that the deception that results from negligent nondisclosure is no less damaging than that which is a product of guile and that such nondisclosure entitles the defendant to relief. We find the reasoning of such cases persuasive and essential to the fair administration of criminal justice especially in view of the disadvantages facing the accused in the trial process."
>
> United States Court of Appeals, District of Columbia Circuit, *Levin v. Katzenbach,* 363 F. 2d 287 (1966);
>
> "The Duty of the Prosecutor to Disclose Exculpatory Evidence," 60 Columbia Law Review 858 (1960);
>
> "The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant," 74 Yale L. J. 136 (1964).

Mr. Justice Fortas in *Giles,* infra, has stated:

> "The State's obligation is not to convict, but to see that, so far as possible, truth emerges . . . No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."
>
> ". . . our total lack of sympathy for the kind of physical assault which is involved here may not

lead us to condone state suppression of information which might be useful to the defense."

"I believe that deliberate concealment and nondisclosure by the State are not to be distinguished in principle from misrepresentations."

"The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense—regardless of whether it relates to testimony which the state has caused to be given at the trial—the State is obligated to bring it to the attention of the court and the defense."

"If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceeding—is not a sporting event."

Giles et al. v. State of Maryland, 17 L. Ed. 2d 747 (1967);

Miller v. Pate, 17 L. Ed. 2d 690 (1967).

2. The prejudicial effect to the defendant by virtue of the prosecutor overbooking and overcharging is no accident. The enforcement authorities, as is usual, in the instant case charged beyond and attempted to prove beyond any legitimate belief in the validity of their cause, a hodgepodge of crimes. All in high hopes forcing a "cop out plea" or arousing prejudice in the trial. The latter amply succeeded. The defendant was charged with: (1) *two counts* of conspiracy (P.C. 311.2) to prepare and distribute obscene matter; (2) *two counts* of assault (P.C. §245) by means of force

likely to cause great bodily injury; (3) and *a final count* of sodomy (P.C. §286). The jury acquitted on the sodomy charges, convicted on the two conspiracy charges and one charge of aggravated assault and the offense of single assault included in the other charge of aggravated assault.

The simple assault conviction was subsequently dismissed.

The Court of Appeal directed the trial court to vacate and set aside the two convictions of conspiracy. This was based on the fact that the statute, California Penal Code §311.2 as interpreted had been found in violation of the First and Fourteenth Amendments to the federal Constitution. *In re Klor* (1966), 64 Cal. 2d 816; *People v. Samuels,* supra.

Our earnest belief is that the defendant should be given a new trial on the one remaining count of P.C. 245. This trial would not be inherently prejudiced as was the first one. The four other invalid counts having been disposed of as indicated in the preceding paragraph, could not now inflame the prejudices and intensify the insecurity of the Court and jurors. A fair, impartial and objective trial could be had to determine the innocence or guilt of the defendant.

3. The instant appellate decision ignores the historical requirement for a corpus delicti. A film made for educational and scientific research has been accepted as proof enough that crimes aplenty were committed—films made by a highly qualified practicing physician in cooperation with the University of In-

diana's Kinsey Institute for Sex. No complainant or so-called "victim" has complained or testified against the physician defendant.

The field of make-believe as portrayed on film and the stage are now at the mercy of some ill or vicious prosecutor who may cause an arrest of the actors and use the film as his "evidence" of a crime; it worked so far in the instant case. The First and Fourteenth Amendments to the federal Constitution have thusly been ignored.

4. If the rules of evidence we have developed mean anything, double hearsay as outlined in Questions Presented (No. 9, supra), certainly indicate an abuse. *People v. Chapman,* supra, makes a fine landmark to use as a comparison.

5. History is replete with innumerable examples of the subject of sadomasochism. From the earliest records of civilization we find evidence of this. From the cartoonist caveman with mace dragging the smiling female; the various religious orders with self-flagellation as well as corporal punishment by the holy superiors; the overbearing dominating wife to her effacing husband; to sports contests in general; e.g. cock fights, bull fights, wrestling, boxing—these are all forms of sadomasochism. This facet of the homo-sapien personality exists. It has been only recently that the field of science has attempted to help us take inventory of this machine called man and his true being. The history of progress is strewn with innumerable examples of where some poor miserable inse-

cure soul with a badge of authority has said, "STOP in the name of decency" and prosecuted the van. Science is beginning to try to help by inquiring into the ramifications of sadomasochism if they can have the protection of the law to keep them out of jail in the process. Recent articles of note are: Play, Paradox, and People: The Myth of Normality, by Don D. Jackson, M.D., in Medical Opinion and Review, Vol. 3, No. 5, May, 1967; Cities: A Study in Sadomasochism, by Jack Chernus, M.D., in Medical Opinion and Review, Vol. 3, No. 5, May, 1967.

6. As reluctant as petitioner's counsel is to attack trial counsel, the record does leave much to be desired. The point raised in Questions Presented No. 11 being a prime example. San Jose, California, is an overgrown adolescent farming community. Its proximity to internationally renowned centers of learning and cosmopolitan cities has not affected its rural character. It is this lack of sophistication in both the news media employees and the peers of the community which combined to prevent the defendant from getting a fair trial. After all, jurors knew that *their* peers had been reading all the lurid details of the trial in the newspapers, listening on the television and radio call-in-and-gossip programs. This knowledge and the fact that they would be embarrassed to have found the petitioner "not guilty" contributed to the guilty verdicts. A trial on the merits of the case away from the community where gossip and irresponsible "news" coverage glutted the Court and jury would have given the blindfolded lady with the scales a chance. As it

was, the lady's scales were weighted down by an irresponsible group of scavengers of "news". *Sheppard v. Maxwell,* supra.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Dated, San Francisco, California,
December 11, 1967.

Respectfully submitted,
EVANDER C. SMITH,
Attorney for Petitioner.

ROBERT S. FIELD,
Of Counsel.

(Appendix A Follows)